

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 7, is reproduced in part below.

Supreme Court Rules Citizen Suits not Allowed for Past EPCRA Violations

On 4 March 1998, the U.S. Supreme Court issued an opinion in the case of *Steel Co. v. Citizens for a Better Environment*.¹ The court held that the citizen suit provision of the Emergency Planning Community Right to Know Act (EPCRA)² cannot be used to bring lawsuits for wholly past violations of the law.³ Although it deals specifically with the citizen suit provision of one statute, this case could have important implications for citizen suits that are brought under other statutes as well.

Citizens for a Better Environment (CBE) filed suit against the Chicago Steel and Pickling Company for past violations of the EPCRA's reporting requirements. The alleged violations concerned failure to file required reports. Prior to filing the lawsuit, the group provided notice of intent to sue to the company, the Environmental Protection Agency (EPA), and the appropriate state authorities, as required by the citizen suit provision of the EPCRA.⁴ After receiving notice from CBE, the company filed the overdue reports.⁵ The citizens group filed

the suit anyway, seeking: (1) a declaratory judgment that the company had violated the EPCRA; (2) authorization to periodically inspect the company's facility and records; (3) an order requiring the company to provide CBE with copies of all compliance reports submitted to the EPA; (4) an order requiring the company to pay civil penalties of \$25,000 per day for each day of violation; (5) CBE's costs in connection with investigation and prosecution of the matter, including attorney fees; and (6) any other relief deemed appropriate by the court.⁶

The Court ruled that CBE did not have standing to bring the suit for wholly past violations of the law. Standing requires injury in fact (concrete and actual, not speculative), causation (a fairly traceable connection between the plaintiffs injury and the complained-of conduct by the defendant), and redressability (the likelihood that the requested relief will redress the alleged injury).⁷

The Court ruled that the lawsuit brought by CBE lacked redressability. The Court examined the six items of requested relief and determined that none of them met the redressability requirement. The Court noted that a declaratory judgment in this case (the first type of relief requested), where there is no controversy over whether the company filed the reports, would be worthless not only to the respondent, but "worthless to all the world."⁸ The Court stated that items two and three of the requested relief are in the nature of an injunction and; therefore, cannot be a remedy for a past wrong but is instead a deterrent from future violations.⁹ The Court held that item four of the requested relief, relating to civil penalties, are paid to the federal treasury rather than the citizens.¹⁰ The Court reasoned that although the citizens may gain some "psychic satisfaction" from seeing wrongdoers punished or making sure the federal treasury is not cheated, this satisfaction does not meet the redressability requirement for standing.¹¹ The Court then noted

1. 118 S. Ct. 1003 (1998).

2. 42 U.S.C.A. §§ 11001-11050 (West 1998). The citizen suit provision is located at 42 U.S.C.A. § 11046.

3. *Steel Co.*, 118 S. Ct. at 1018.

4. *Id.* at 1003. See 42 U.S.C.A. § 11046(d).

5. *Steel Co.*, 118 S. Ct. at 1009. Apparently, the company had not filed a single report since enactment of the EPCRA in 1988.

6. *Id.* at 1008.

7. *Id.* at 1007 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

8. *Id.* at 1018.

9. *Id.* at 1019.

10. *Id.* at 1018.

that “investigation and prosecution” costs are insufficient to create standing where no standing is established on the underlying claim.¹²

This case is significant for federal agencies for at least two reasons.¹³ First, it presents an additional defense to cases brought under the citizen suit provisions of other environmental statutes. In *Gwaltney v. Chesapeake Bay Foundation, Inc.*,¹⁴ the Supreme Court ruled that the citizen suit provisions of the Clean Water Act (CWA) cannot be used to litigate wholly past violations of that statute. To the extent that the citizen suit provisions of other environmental statutes may allow suits for purely historical violations, the constitutional standing requirements laid out in *Steel Company* provide an additional hurdle that plaintiffs must meet in order to bring such suits.

The other significant aspect of the decision is the Court’s language regarding declaratory judgments for past violations. Often, plaintiffs will seek a declaratory judgment, not because it will benefit them in the current case, but because they may be able to use that judgment against the agency in other litigation or for public relations purposes. This case lends support to the argument that, if the wholly past violation is undisputed by all parties, a declaratory judgment indicating such historical facts would be inappropriate. Major Romans and Major Mayfield.

The Administration’s Specifications for RCRA Remediation Waste Legislation

On 15 April 1998, the Clinton Administration finalized legislative specifications for remediation waste for use in negotiations with Congress on cleanup legislation.¹⁵ The administration’s principles were proposed in response to legis-

lation drafted this year by Senator Trent Lott’s staff.¹⁶ Senator Lott’s draft Resource Conservation and Recovery Act (RCRA) reform bill is based on an earlier bill that he introduced in the 104th Congress.¹⁷ Since that time, based on stakeholder input, the legislation has been rewritten to narrow the wastes addressed, to provide additional public participation, and to clarify minimum cleanup conditions.

The legislative specifications provide general principles for remediation waste legislation and address some specific areas of concern.¹⁸ In general, the administration supports tailoring minimum technology, restricting land disposal, and permitting requirements for hazardous remediation waste to encourage cleanup of contaminated sites.¹⁹ The specifications limit reforms to the minimum changes necessary to address these areas, while prohibiting any affect on RCRA requirements for non-remediation waste.²⁰

The administration proposes to grant the EPA the authority to identify certain remediation wastes that do not require treatment for the protection of human health and the environment.²¹ In addition, the administration would like the EPA to have the authority to modify, by regulation, the existing land disposal restrictions to institute alternative treatment for remediation wastes.²² In the interim, the administration supports a presumptive remediation waste treatment standard for principal threats that require treatment to ninety percent reduction in concentrations of hazardous constituents or ten times the universal treatment standard, whichever is higher.²³ This presumptive standard, however, is subject to adjustment based on what the administration calls “appropriate factors.”²⁴ The administration indicates, by use of a placeholder in the document, that the factors will be determined through the legislative process.²⁵

11. *Id.* at 1019.

12. *Id.* at 1018.

13. The specific ruling of the case, that EPCRA citizen suit actions cannot be brought for wholly past violations of the statute, should not affect federal agencies, since federal facilities are not subject to citizen suit enforcement of EPCRA requirements. See Exec. Order No. 12,856, 58 Fed. Reg. 41,981 (1993) (containing requirements of federal facilities under the EPCRA).

14. 484 U.S. 49 (1987).

15. Clinton Administration’s Remediation Waste Legislative Specifications (Apr. 15, 1998) (on file with author) [hereinafter Specifications].

16. Discussion Draft of Senate RCRA Bill (Jan. 15, 1998) (on file with author).

17. S. 1274, 104th Cong. (1996).

18. Specifications, *supra* note 15.

19. *Id.* at 2.

20. *Id.* at 3.

21. *Id.* at 4.

22. *Id.*

23. *Id.* at 5.

The administration specifies that the EPA should have the authority to modify existing minimum technological requirements to allow alternatives for hazardous remediation waste. The alternative technological requirements must, however, ensure that waste treatment, storage, and disposal units are designed and operated to minimize any release of waste into the environment, as well as to detect and to characterize any releases.²⁶

The specifications call for a special RCRA Subtitle C permit for hazardous remediation waste treatment, storage, and disposal facilities.²⁷ If the facility is already otherwise permitted, the permit could be modified to cover remediation waste.²⁸ By rulemaking, the EPA could modify facility standards that are implemented through the permitting process to address special characteristics of remediation waste.²⁹ At a minimum, the administration wants the permits to specify principal threats of any hazardous remediation waste and the measures to address the threats; to describe the on-site management of the waste; and to specify record keeping and reporting requirements to enforce permit conditions.³⁰ The administration supports the removal of the RCRA corrective action requirements from permits for facilities that manage only hazardous remediation waste.³¹

The administration calls for the use of existing enforcement provisions under the RCRA for alternative remediation waste requirements. The administration wants legislation to ensure that the EPA is administratively able to order cleanup of releases from hazardous remediation waste units at cleanup-only facilities. Also addressed is the need for the EPA to be able

to impose alternative remediation requirements for a facility that is undergoing cleanup.³²

Although the specifications set out the parameters for remediation waste legislation, there remains much room for debate. The administration does not address the particulars of when and how contaminated waste should be treated or contained and what factors should control cleanup decisions. Also, the specifications do not speak to state-approved cleanup plans or to the possibility of removing certain types of remediation waste to Subtitle D regulation. It is too early to know whether there is enough common ground between the sponsors of the draft bill and the administration for finalization of legislation this year. Major Anderson-Lloyd.

Update on Administrative Penalties under the Clean Air Act

Last summer, the Department of Justice (DOJ) opined³³ that the Clean Air Act (CAA)³⁴ authorized the Environmental Protection Agency (EPA) to issue punitive administrative fines to other federal agencies. In 1994, the EPA proposed a field citation rule³⁵ that allows the EPA agents to impose ticket-like fines on federal agencies for minor violations of the CAA.³⁶ The DOJ opinion came as a result of comments by the Department of Defense (DOD) to the proposed rules inclusion of federal agencies. The opinion went beyond addressing the initial dispute over the EPA's authority to issue field citations and found that the EPA has the authority to issue the full range of administrative fines under the CAA.³⁷

24. *Id.*

25. *Id.*

26. *Id.* at 5, 6.

27. *Id.* at 7.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 8.

32. *Id.* at 9.

33. See Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, subject: Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act, at 10 (July 16, 1997) (on file with author) [hereinafter DOJ Opinion].

34. 42 U.S.C.A. §§ 7401-7671q (West 1998).

35. Field Citation Program, 59 Fed. Reg. 22,776 (1994).

36. See 42 U.S.C.A. § 7413(d)(3) (authorizing the EPA to issue civil penalties not to exceed \$5000 per day of violation for minor violations).

37. DOJ Opinion, *supra* note 33, at 1. This includes issuing larger punitive fines under 42 U.S.C.A. § 7413(d)(1) which authorizes administrative fines of up to \$25,000 per day of violation. See 42 U.S.C.A. § 7413(d)(1).

Before the EPA can begin issuing field citations, it must promulgate a final field citation rule.³⁸ During work to finalize the field citation program, the EPA has allowed the DOD to comment on the recently-added federal agency procedural due process aspects of the program.³⁹ The draft revision of the rule sets out factors for determining whether a violation of the CAA is minor.⁴⁰ It also establishes maximum daily fine amounts⁴¹ and total fine amounts⁴² for a given field citation. If the revision is promulgated as drafted, it will afford federal agencies a hearing before an EPA regional office attorney, the right to appeal the hearing officers decision to the Environmental Appeals Board (EAB), and the opportunity for a conference with the EPA administrator.⁴³ It is unlikely that this rule will be effective before September 1998.⁴⁴

The DOJ opinion also created a need for the EPA to revise its rules of practice⁴⁵ to address due process procedures for federal agencies that receive larger fines under the CAA; current rules do not allow for this. The EPA recently proposed revisions⁴⁶ to its Rules of Practice that provide generic procedures for administrative fines that are imposed under various media statutes. The proposal contains supplemental rules that apply specifically to the CAA. Under those rules, federal agencies against which the EPA assesses fines, that are not field citations, may receive hearings before an administrative law judge, appeal to the EAB, and confer with the Administrator before the action is final.⁴⁷ After reviewing the proposed rule, legal representatives from the DOD CAA Services Steering Committee determined that no comments were necessary.

The fallout from the DOJ opinion indicates that within the next year installations will be subject to punitive fines imposed by the EPA under the CAA. There has been no change in the Army's policy concerning payment of punitive fines that are imposed by state regulators under the CAA. It continues to be

the Army policy that the doctrine of sovereign immunity precludes payment of state-imposed punitive fines under the CAA. Lieutenant Colonel Jaynes.

EPA's Final Supplemental Environmental Projects (SEP) Policy Hits the Web

The Environmental Protection Agency (EPA) has issued the final Supplemental Environmental Projects (SEP) policy after almost three years of experience implementing and fine-tuning the interim revised SEP policy that was issued in 1995. Although the EPA characterizes the final policy as containing no radical changes or alterations to the basic structure and operation of the SEP policy, there are several other changes. Included in these are: increased community input in SEP development, a prohibition on the use of SEPs to mitigate stipulated penalties except in extraordinary circumstances; expanded penalty calculation methodology, and revised legal guidelines.

The most significant change appears to be a shift in the EPA policy toward federal facilities and the economic benefits of noncompliance. Under the interim policy, government agencies could pay cash settlement amounts that were less than the required ten percent of the economic benefit of noncompliance. Under the final policy, this provision has been removed and replaced with a provision that allows government agencies (as well as small businesses and nonprofit organizations) to claim an SEP mitigation percentage as high as 100% of the SEP cost, if the agency can demonstrate that the SEP is of outstanding quality. Thus, under the final policy, government agencies may not be able to argue for a different application of economic benefit principles.

38. See 42 U.S.C. § 7413(d)(3) (permitting the EPA to implement field citation program through regulations).

39. Field Citation Program, 40 C.F.R. pt. 59 (proposed Nov. 17, 1997) (unpublished draft, on file with author).

40. *Id.* § 59.3. These factors include: whether the violation is readily recognizable; the risk of environmental harm; time, effort, and expense required to correct the violation; and the frequency and duration of the violation. *Id.*

41. *Id.* The maximum is \$5500 per day, regardless of the number of violations that may have occurred each day. The maximum amount is larger than the \$5000 cited in the CAA as the result of the Federal Civil Penalties Inflation Adjustment Act of 1990. See 28 U.S.C.A. § 2461 explanatory note (West 1998), as amended by Debt Collection Improvement Act of 1996, 31 U.S.C.A. § 3701 explanatory note (West 1998); (implemented in Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. pt. 19 (1997)).

42. *Id.* The total that may be assessed for a single field citation is five times the maximum per-day civil penalty (which is currently \$27,500).

43. *Id.* §§ 59.5-59.6.

44. Telephone Interview with Mr. Cary Secrest, Office of Air and Radiation, Environmental Protection Agency (Apr. 30, 1998). According to Mr. Secrest, the field citation rule is still pending approval by the administrator. Once approved, it will be reviewed at Office of Management and Budget for 90 days before being published in the Federal Register. The rule will be effective 60 days after promulgation. *Id.*

45. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. pt. 22 (1997).

46. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 63 Fed. Reg. 9464 (1998) (to be codified at 40 C.F.R. pt. 22).

47. *Id.* at 9476 and 9491.

The SEP policy became effective 1 May 1998 and is available on the Internet at <http://es.epa.gov/oeca/sep/sepfinal.html>. Major Silas DeRoma.

Litigation Division Note

When a Claim Becomes a Claim: It Might Be Different Than You Think

There continues to be confusion in the field regarding the date that the two year statute of limitations begins to run on claims under the Federal Tort Claims Act (FTCA).⁴⁸ This confusion not only complicates the claims investigation unnecessarily but also can prejudice the United States when it asserts the defense in litigation. This note reviews the rules and should help practitioners to speed the claims process in appropriate cases.

Under the FTCA “a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues”⁴⁹ Because there is a two-year limit on presentment of the claim, it is important to determine when the two-year clock begins (when the claim accrued). The filing of an administrative claim is jurisdictional and cannot be waived.⁵⁰

The accrual question is controlled by federal law⁵¹ and is simple enough in most cases. For example, the claim accrues when a government vehicle hits the claimant’s car or when the claimant slips on an oil spill in the post exchange. In some cases, however, it is not so simple. For example, did the claim accrue on the day of the claimant’s injury or when claimant dis-

covered the injury? Did it accrue when the claimant discovered the cause of the injury or at some other point?

In *United States v. Kubrick*⁵² the U.S. Supreme Court held that a claim accrues when the claimant knows that he has been injured and the likely cause of the injury.⁵³ He need not know that the injury was caused by negligence.⁵⁴ In *Kubrick*, the plaintiff was negligently treated by a Veteran’s Administration hospital (VAH). Soon after this treatment, the plaintiff noticed a loss of hearing. A second doctor told him that the treatment at the VAH may well be the cause of his hearing loss. More than two years later, Kubrick was told that the treatment he received at the VAH was negligent. The plaintiff then filed his administrative claim under the FTCA.

The Supreme Court held that the claim accrued after the second doctor’s advice because Kubrick had actual knowledge of his injury and its likely cause.⁵⁵ The lower court had held that a claim does not accrue until a claimant learns that his injury is legally actionable. The Supreme Court rejected this view and held that a plaintiff who knows “he has been hurt and who has inflicted the injury” may protect himself by seeking medical or legal advice to determine whether the cause of the injury is actionable.⁵⁶ Therefore, a claimant is under a duty of diligent inquiry.⁵⁷ He may not wait until he is told that he has a legal claim.⁵⁸ In fact, he need not even be aware that his injury was negligently inflicted.⁵⁹ Instead, he must take affirmative action to investigate whether his injury was caused by negligence and is therefore a proper claim.⁶⁰

A claimant must file an administrative claim within two years of discovering both his injury and the source of his injury, even if he does not know that the person who injured him was a federal employee acting within the scope of his employment. The U.S. Court of Appeals for the Ninth Circuit has held that once a claimant knows of his injury and its cause, the claimant’s

48. 28 U.S.C.A. §§ 2401(b)-2671 (West 1998).

49. *Id.* § 2401(b).

50. *See Cook v. United States*, 978 F.2d 164, 165 (5th Cir. 1992).

51. *See Johnston v. United States*, 85 F.3d 217 (5th Cir. 1996).

52. 444 U.S. 111 (1979).

53. *Id.*

54. *Id.*

55. *Id.* at 122.

56. *Id.*

57. *See Kerstetter v. United States*, 57 F.3d 362 (4th Cir. 1995).

58. *Kubrick*, 444 U.S. at 124.

59. *Id.* at 123.

60. *Id.*

ignorance of the involvement of United States employees is irrelevant.⁶¹ “In the absence of fraudulent concealment it is the plaintiff’s burden, within the statutory period, to determine whether and whom to sue.”⁶²

To evaluate the accrual date of a claim, a practitioner must first determine what may have caused the injury. Next, he must determine when the claimant became aware of the injury. This is when the claim accrues and when the statute of limitations

begins. A claim that is not presented within two years of its accrual is barred. If the claim is not filed within two years of that date, it is barred by the statute of limitations.⁶³ Although each circuit may have a slightly different twist on the “accrual date,” this methodology provides a good base line analysis upon which to begin an inquiry as to when a claim accrues. Major Diedrichs.

61. See *United States v. Gibson*, 781 F.2d 1334, 1344 (9th Cir. 1986) (citing *Dyniewicz v. United States*, 742 F.2d 484 (9th Cir. 1984)).

62. *Gibson*, 781 F.2d at 1334 (quoting *Davis v. United States* 642 F.2d 328 (9th Cir. 1981)).

63. *Kubrick*, 444 U.S. at 111.